No. 99-328

In the Supreme Court of the United States

CITY OF NEW YORK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1644 (Supp. III 1997), and Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. 1373 (Supp. III 1997), which preempt state and local laws inhibiting state and local governmental entities and employees from providing information about the immigration status of individuals to the Immigration and Naturalization Service, violate the Tenth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Condon v. *Reno*, 155 F.3d 453 (4th Cir. 1998), cert. granted, No. 98-1464 (May 17, 1999)	6-7, 11, 12
Garcia v. *San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985)	5
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)	4, 8
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1818)	9
New York v. *United States*, 505 U.S. 144 (1992)	4, 5, 9, 10
Printz v. *United States*, 521 U.S. 898 (1997)	4, 5, 9, 10, 11
Reno v. *Flores*, 507 U.S. 292 (1993)	7
Takahashi v. *Fish & Game Comm'n*, 334 U.S. 410 (1948)	7

Constitution and statutes:

U.S. Const.:	
Art. IV, § 4 (Guarantee Clause)	3
Art. VI, Cl. 2 (Supremacy Clause)	8
Amend. X	3, 4, 5, 9
Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725 (1994 & Supp. III 1997)	11
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 642, 110 Stat. 3009-707:	
§ 642, 8 U.S.C. 1373 (Supp. III 1997)	1-2, 3, 5, 6, 9
§ 642(a), 8 U.S.C. 1373(a) (Supp. III 1997)	3
§ 642(b), 8 U.S.C. 1373(b) (Supp. III 1997)	3

Statute—Continued: Page

Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 434, 8 U.S.C. 1644 (Supp. III 1997) 1, 3, 6, 9

Miscellaneous:

H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. (1996) 3, 8

H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1 (1996) 7

In the Supreme Court of the United States

No. 99-328

CITY OF NEW YORK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 179 F.3d 29. The opinion of the district court (Pet. App. 53-88) is reported at 971 F. Supp. 789.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1999. The petition for a writ of certiorari was filed on August 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a constitutional challenge brought by the City of New York and its Mayor to Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 8 U.S.C. 1644 (Supp. III 1997), and Section 642 of the

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. 1373 (Supp. III 1997). As pertinent here, those provisions preempt a New York City Executive Order that, with limited exceptions, forbids City employees from voluntarily sharing information about aliens with federal immigration authorities. Pet. App. 3-6.

In 1989, the Mayor of New York City issued Executive Order No. 124 (Order). Pet. App. 96-98. The Order provides that "[n]o City officer or employee shall transmit information respecting any alien to federal immigration authorities" unless the disclosure is "required by law," the alien has authorized the disclosure, or the alien is "suspected of * * * engaging in criminal activity." *Id.* at 97.[1] The Order's "Statement of Basis and Purpose" (*id.* at 107-109) explains that many aliens who lived in the City were failing to make use of City services, "largely from fear that any contact with a government agency will bring them to the attention of federal immigration authorities." *Id.* at 108. The statement concluded that this reluctance of aliens to use City services operated "to the disadvantage of all City residents." *Ibid.*

2. In 1996, Congress enacted two provisions that preempt Executive Order No. 124. Section 434 of

---

[1] The Order further provides that City agencies shall designate officers or employees to be responsible for receiving reports from line workers who suspect criminal activity by aliens and for determining on a case-by-case basis what action, if any, to take on such reports. The Order bars line workers from transmitting information about any alien directly to federal immigration authorities. In addition, the Order bars City law enforcement agencies from transmitting to federal immigration authorities information about the immigration status of crime victims. See Pet. App. 97-98.

PRWORA provides that, notwithstanding any other provision of federal, state or local law, "no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States." 8 U.S.C. 1644 (Supp. III 1997). That provision permits, but "does not require, in and of itself, any government agency or law enforcement official to communicate with the INS." H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 383 (1996). Section 642 of IIRIRA similarly provides that, notwithstanding any other provision of federal, state or local law, "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. 1373(a) (Supp. III 1997).[2]

3. a. New York City brought this action for declaratory and injunctive relief in federal district court, contending that Sections 1373 and 1644 violate the Tenth Amendment and therefore do not nullify Executive Order No. 124. Pet. App. 21-44.[3] The district court

---

[2] Section 642(b) of IIRIRA further provides that, notwithstanding any other provision of federal, state or local law, "no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity" from sending information about an individual's immigration status, lawful or unlawful, to the INS, from maintaining such information, or from exchanging such information with any other federal, state, or local government entity. See 8 U.S.C. 1373(b) (Supp. III 1997).

[3] The City also alleged that Sections 1373 and 1644 violate the Constitution's Guarantee Clause (Art. IV, § 4). See Pet. App. 42-

granted the federal government's motion for judgment on the pleadings. *Id.* at 54-91. The court first rejected the City's claim that the challenged provisions contravene the Tenth Amendment because they interfere with city policymaking: "Congressional legislation is not unconstitutional merely because it displaces state policy choices in an area in which Congress has the power to regulate." *Id.* at 72 (citing *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981)).

The district court then held that the challenged provisions do not run afoul of this Court's decisions in *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997), that Congress may not commandeer the States or their officials into federal service by requiring them to enact or implement a federal regulatory scheme. The court explained that the challenged provisions "do not require the City to legislate, regulate, enforce, or otherwise implement federal immigration policy." Pet. App. 73. To the contrary, "they direct only that City officials and agencies be allowed, if they so choose, to share information with federal authorities." *Ibid.* Indeed, the statutes "do not even require any City official to provide any information to federal authorities." *Id.* at 74. Thus, the challenged provisions are "even less intrusive on state sovereignty than those mandatory reporting statutes whose validity the Supreme Court explicitly refrained from deciding." *Id.* at 76.

The district court likewise rejected the argument that the challenged provisions are invalid because they diminish political accountability. The court explained

---

43. The district court and the court of appeals rejected that claim, and the City has not pressed it before this Court.

that, "although political accountability is a basis for concluding that Congress lacks the power to compel the states to regulate or to conscript state and local officials in carrying out a federal program, political accountability standing alone is not a basis for invalidating a Congressional statute that does not implement a federal program in an impermissible way." Pet. App. 78.

Finally, the district court rejected the argument that the challenged provisions are unconstitutional because they interfere with core City functions. See Pet. App. 83-84 (explaining that this Court rejected, "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional' ") (quoting *Garcia* v. *San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 546-547 (1985)).

b. The court of appeals affirmed. The court agreed with the district court that, unlike the statutory provisions at issue in *New York* and *Printz*, Sections 1373 and 1644 "do not directly compel states or localities to require or prohibit anything." Pet. App. 13. Instead, "they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS." *Ibid.* Stressing that the Supremacy Clause "bars states from taking actions that frustrate federal laws and regulatory schemes," *id.* at 14, the court declined "to turn the Tenth Amendment's shield against the federal government's using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that frustrates federal programs." *Id.* at 13-14.

The court also rejected the argument that the challenged provisions are invalid because they interfere with important city operations. The court suggested that the City's interest in preserving the confidentiality of information was "not insubstantial," Pet. App. 16, but concluded that the City had "chosen to litigate this issue in a way that fails to demonstrate an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local governmental employees." *Id.* at 17. The court observed that Executive Order No. 124 is not a general policy that limits the disclosure of confidential information; instead, "it singles out a particular federal policy for non-cooperation while allowing City employees to share freely the information in question with the rest of the world." *Ibid.* The court explained that, although it had invited the City to explain whether the information covered by the Order might be subject to other confidentiality provisions that would prevent its dissemination generally, the City's response provided the court only with a list of policies that might or might not protect information about immigration status. See *id.* at 18.

ARGUMENT

The decision of the court of appeals, upholding the challenged provisions of Sections 1373 and 1644 of Title 8 of the United States Code as valid exercises of Congress's power to ensure that the effectiveness of federal legislation is not impaired by state law, is correct and does not conflict with any decision of this Court or any other court of appeals. Nor, contrary to petitioners' contention (Pet. 20), does this case involve the issues currently before the Court in *Reno* v. *Condon*, No. 98-

1464 (to be argued Nov. 10, 1999). The petition for a writ of certiorari should therefore be denied.

1. Congress has plenary and exclusive power to regulate immigration. Indeed, "[o]ver no conceivable subject is the legislative power of Congress more complete." *Reno* v. *Flores*, 507 U.S. 292, 305 (1993) (internal quotation marks and citation omitted). As the Court has explained:

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.

Takahashi v. *Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (citation omitted).

In exercising its broad powers to regulate immigration, Congress has determined that the costs of allowing unrestricted immigration would exceed the benefits of such a policy. See, *e.g.*, H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 110 (1996) ("[u]nlimited immigration * * * is a moral and practical impossibility"). Congress has accordingly enacted a comprehensive and detailed regulatory scheme that establishes the number of aliens who may be admitted to the United States, the bases on which aliens may or must be excluded from the United States, the conditions under which aliens may remain in the United States, and the circumstances under which they may be removed.

Congress has also made plain that "immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Conf. Rep. No. 725, *supra*, at 383. In enacting the provisions at issue here, Congress determined that a state or local governmental policy barring voluntary cooperation with federal law enforcement officials was incompatible with that important priority of effective federal implementation of the immigration laws. Thus, the challenged statutes preempt such provisions that require governmental officials not to provide information to federal immigration officers.

Petitioners' contention that Congress has no power to preempt the 'policy choices embodied in Executive Order No. 124," Pet. 17, is therefore without foundation. Congress has such authority by virtue of its plenary authority to regulate immigration. Plainly, when Congress determines that a provision of local law is inconsistent with the enforcement of federal law, the Constitution places no obstacle to federal preemption. And although such "congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits of no other result." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).

Petitioners argue that "[t]he People of the States did not * * * confer authority upon Congress to subordinate their health, safety and well-being to the regulation of immigrants in accordance with congressionally-imposed rules." Pet. 20-21. That argument turns the Supremacy Clause on its head. It may well be that New York City has determined that,

from its perspective and that of its residents, the costs of enforcing the federal immigration laws exceed the benefits, but Congress is responsible for balancing the costs and benefits of federal immigration policy for the Nation as a whole, and it has reached a different conclusion. It is axiomatic that "the government of the Union, though limited in its powers, is supreme within its sphere of action." *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1818).

2. The provisions challenged in this case are therefore an unexceptionable exercise of Congress's authority to preempt state laws that, Congress concludes, impair the effectiveness of federal legislation that falls within the legitimate scope of congressional power. Petitioners contend, nonetheless, that Sections 1373 and 1644 contravene the Tenth Amendment as construed in this Court's decisions in *New York* and *Printz*, but those decisions lend no support to petitioners' claim.

The statute at issue in *New York* required the States either to regulate the way that private entities disposed of low-level radioactive waste, or to take title to that waste and assume liability for the private generators' damages. See *New York*, 505 U.S. at 153-154. Both provisions effectively required the States to adopt a regulatory solution to problems created by private conduct.

As the Court explained in *New York*, imposing an affirmative obligation on the States to take title to the private waste was "no different from a congressionally compelled subsidy from state governments to radioactive waste producers," and requiring the States to assume liability for the generators' damages was "indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state

residents." 505 U.S. at 175. On the other hand, the option of "regulating pursuant to Congress' direction" presented "a simple command to state governments to implement legislation enacted by Congress." *Id.* at 175-176. The Court explained that "[e]ither way, the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 186 (citation and internal quotation marks omitted).

Similarly, the statute at issue in *Printz* required state officials to make reasonable efforts to determine whether proposed handgun sales by private sellers to private buyers would be unlawful. See *Printz*, 521 U.S. at 903. The Court therefore held that the case was governed by its holding "in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program." *Id.* at 935. The Court made clear that "Congress cannot circumvent that prohibition by conscripting the States' officers directly." *Ibid.* Thus, as in *New York*, the provision in *Printz* was invalidated because it "dragooned" state governments into implementing a federally prescribed regulatory solution to private sector problems that were not of the States' own making. *Id.* at 928.

The provisions challenged here do not violate the anti-commandeering principle articulated in *New York* and *Printz*. As the courts below explained, the provisions at issue in this case "do not directly compel states or localities to require or prohibit anything." Pet. App. 13. They "do not require the City to legislate, regulate, enforce, or otherwise implement federal immigration policy." *Id.* at 73. Indeed, they "do not even require any City official to provide any informa-

tion to federal authorities." *Id.* at 74.[4] Rather, to promote the effective enforcement of federal immigration laws and policies, the challenged provisions simply ensure that state and local government officials (like federal officials and private individuals) will be free to provide information about the immigration-related status of an alien to the INS in the ordinary course of business, without interference from state and local laws.

3. Petitioners argue (Pet. 20) that the decision of the court of appeals in this case conflicts with the court of appeals' decision in *Condon* v. *Reno*, 155 F.3d 453 (4th Cir. 1998), cert. granted, No. 98-1464 (to be argued Nov. 10, 1999). In *Condon*, a divided panel of the Fourth Circuit invalidated the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), which imposes restrictions on the dissemination of information from records of state motor vehicle departments. In *Condon*, the the Fourth Circuit held the DPPA invalid because, it concluded, "Congress may only subject the States to legislation that is also applicable to private parties." 155 F.3d at 461.

---

[4] In *Printz*, this Court distinguished the case before it from that of statutes that "require only the provision of information to the Federal Government" and therefore do not involve "the forced participation of the States' executive in the actual administration of a federal program." 521 U.S. at 918. As the concurrence explained, the Court thus "appropriately refrain[ed] from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers [were] similarly invalid." *Id.* at 936 (O'Connor, J., concurring). The provisions challenged here, which impose no reporting requirements on the States, are "even less intrusive on state sovereignty than those mandatory reporting statutes whose validity the Supreme Court explicitly refrained from deciding." Pet. App. 76.

We have explained in our briefs on the merits in this Court in *Condon* that the categorical rule announced by the Fourth Circuit in that case has no basis in precedent or logic.[5] We also note, however, that the Fourth Circuit did not hold in *Condon* that Congress may not preempt state law that inhibits the operation of federal law as an incident to Congress's otherwise legitimate exercise of its regulatory powers. In *Condon*, the Fourth Circuit sought to distinguish the DPPA from this Court's preemption cases on the ground that (in its view) the DPPA is not part of a federal regulatory scheme that governs private activity. 155 F.3d at 463 n.6. The provisions challenged here, however, *are* parts of such schemes; PRWORA regulates the area of welfare benefits, including the eligibility of aliens for such benefits, and IIRIRA, which comprehensively amended the Immigration and Nationality Act, regulates the circumstances under which aliens may be admitted to and may reside in the United States. And while we have argued in our brief on the merits in *Condon* (at 38-39) that it is difficult to square the Fourth Circuit's decision with this Court's preemption jurisprudence, the precise issue before the Court in *Condon* is not the validity of a preemption provision, as such. Accordingly, the decision below does not present a conflict with the Fourth Circuit's decision in *Condon*, and there is no need to hold this case for the Court's decision in *Condon*.

---

[5] See Gov't Br. at 34-38 and Gov't Reply Br. at 13-20, *Condon*, *supra*. We are providing petitioners with a copy of those briefs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
Attorneys

OCTOBER 1999